IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
and the
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON, *Respondents.*

BRIEF OF THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., AS AMICUS CURIAE, PRIOR TO CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

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INDEX

CITATIONS

CASES: Page

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Pursuant to Rule 42(1) of the Supreme Court Rules, counsel for the parties have consented in writing to the filing of a brief by the Association on American Indian Affairs, Inc. as *amicus curiae* in the above-captioned case prior to consideration of the petition for a writ of certiorari.

OPINIONS BELOW

The opinions below are printed in the Petition for Writ of Certiorari in Appendix B at A-14.[1]

JURISDICTION

The Court has jurisdiction under 28 U.S.C. 1257 (3). The final judgment of the Supreme Court of the State of Washington was entered on March 13, 1967. The petition for a writ of certiorari was filed herein on June 12, 1967, less than 90 days thereafter in accordance with 28 U.S.C. 2101(c).[2]

STATEMENT OF INTEREST

The Association on American Indian Affairs, Inc. is a non-profit, membership corporation, organized under the laws of the State of New York for the purpose of protecting the rights and promoting the welfare of American Indians. It is today the largest Indian interest organization in the country. The Association's membership includes both Indians and non-Indians, and its activities are nationwide in scope. Because of its deep and longstanding concern with the issues of Indian treaty fishing rights and other questions of major interest to American Indians, the Association submitted a brief, *amicus curiae*, to the Washington Supreme Court in the instant case.

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[1] References to portions of the Petition and the appendices thereto are hereafter referred to as "Pet. —" and "Pet. A —", respectively.

[2] Although the Washington Supreme Court announced its opinion on January 12, 1967, the 90-day period prescribed by 28 U.S.C. 2101(c) did not begin to run until March 13, 1967, the date on which that opinion became the final judgment of the court. Pet. A—67; *Puget Sound Power & Light Co.* v. *County of King*, 264 U.S. 22 (1924).

The decision of the lower court holding (1) that, despite treaty guarantees against such action, the State may restrict fishing by members of the Puyallup Tribe at sites located both within and without the reservation on the same basis as all other citizens, and (2) that the Puyallup Tribe is subject to suit absent consent of the tribe or the United States, raises serious and substantial questions about the continued vitality of Indian treaties and a hitherto well-settled principle of Indian law.

The depth of Indian feeling about treaty fishing rights is well illustrated by the response of some of the Northwestern tribes to attempts by the State of Oregon and Washington to restrict fishing at treaty protected sites. Resistance began with peaceful demonstrations and civil disobedience, but quickly escalated to the unfortunate level of armed resistance to State officers.[3] No less intense is the feeling of the non-Indian community, thus creating the prospect of an ominous racial confornation.[4]

The issues raised by this case clearly are of national importance. Not only have the Indian tribes in Washington, Oregon and Idaho, whose fishing rights were guaranteed by similar treaties, much at stake, but also the United States in its treaty relations with Indians throughout the country is significantly affected. Reflecting such governmental interest, the Department of Justice filed a brief, *amicus curiae,* and participated in the oral argument in this case before the court be-

[3] See, e.g., Portland, Oregon *Oregonian,* April 28 and May 5, 1966, printed in Exhibit A.

[4] See, e.g., Astoria, Oregon *Daily Astorian* of April 26, 1966, printed in Exhibit B.

low. In addition, in an apparent attempt both to provide guidance and foster compromise, the Department of the Interior recently issued regulations purporting to control Indian treaty fishing.[5] In like vein this Court on prior occasions has recognized the emergent need for resolving conflict between Indian fishing rights and the enforcement of State conservation laws. See, e.g., *Tulee* v. *Washington,* 315 U.S. 681 (1942), and *Metlakatla Indian Community* v. *Egan,* 369 U.S. 45 (1962).

The decision of the Washington Supreme Court in this case simply cannot be reconciled with the holdings of the United States Court of Appeals for the Ninth Circuit interpreting similar treaty provisions in *Maison* v. *Confederated Tribes of Umatilla Indian Reservation,* 314 F. 2d 169 (1963), *cert. denied,* 375 U.S. 829 (1964) and *Makah Indian Tribe* v. *Schoettler,* 192 F. 2d 224 (1951). Because of the legal uncertainty, economic instability and cultural shock which the Washington decision has caused, and for the reasons set forth hereinafter, the Association submits this brief, *amicus curiae,* prior to consideration of the petition for a writ of certiorari, and urges this Court to issue the writ and to reverse the ruling of the court below.

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[5] Although the Department's authority to restrict Indian treaty fishing is far from certain, see *Mason* v. *Sams,* 5 F. 2d 255 (W. D. Wash. 1925), and the new regulations (32 Fed. Reg. No. 136 (1967)) fail to provide any standard for exercising Secretarial control, their promulgation points up the need for clarification of the law by this Court.

STATEMENT OF THE CASE

This case started more than one hundred years ago. On December 26, 1854, Isaac S. Stephens, Governor and Superintendent of the Territory of Washington, and his delegation, met with representatives of "the tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets" to present a treaty providing for the cession to the United States of most of the vast area these Indians then occupied. Pet. A.1-9. Excepted out of the foregoing grant were (1) certain relatively small described tracts of land (Article II), and (2) "The right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." (Article III)

After Governor Stephens had explained its provisions, the Indians agreed to execute the treaty, and representatives of the Puyallup Tribe were signatories thereto. Following ratification by the United States Senate, the Treaty of Medicine Creek was signed into law by President Pierce on April 10, 1855. 10 Stat. 1132.

The Puyallup Reservation, established in accordance with the Treaty of Medicine Creek, subsequently was expanded by the Executive Orders of January 20, 1857, and September 6, 1873. The Puyallup River flows through the reservation, emptying into Commencement Bay. Relying upon the treaty commitment described above, the Puyallup Indians fished in the waters of the Puyallup River and Commencement Bay within, and at usual and accustomed places outside, the reservation for almost a century with little or no interference.

In 1954, however, the State charged one Robert Satiacum, a Puyallup Indian, with fishing in violation of the Washington conservation laws, to wit: the possession of game fish during a closed season and the use of fixed nets to catch game fish at two locations, one a usual and accustomed fishing ground of the Puyallup Indians outside the reservation and the other a site inside the Puyallup Reservation, although on land not then in Indian ownership. The case eventually was appealed to the Washington Supreme Court, which affirmed a decision of the Superior Court dismissing the prosecution. *State* v. *Satiacum,* 50 Wash. 2d 524, 314 P. 2d 400 (1957).

Some ten years later, the State once again has sought to restrain members of the Puyallup Tribe from exercising fishing rights secured to them by the United States, this time through the device of a civil declaratory judgment action aimed at the entire tribal membership. Specifically, respondents instituted this action in the Superior Court of the State of Washington through the filing of a complaint alleging that Puyallup Indians were engaged in net fishing in the Puyallup River watershed and Commencement Bay in violation of the regulations of the State Department of Fisheries, and requesting a judgment declaring that the Puyallup Tribe, Inc.[6] and certain named individual defendants were not entitled to any privileges and immunities from application of State conservation measures. Petitioner answered by challenging the court's jurisdiction and asserting, as an affirmative defense, that neither the Puyallup Tribe nor the individual

[6] As the Washington Supreme Court pointed out: "The case caption is erroneous, there being no entity known as The Puyallup Tribe, Inc., a corporation." Pet. A-36 (fn.).

defendants as members thereof are subject to State conservation laws when exercising fishing rights reserved to such tribe by the Treaty of Medicine Creek.

On May 27, 1965, the Superior Court entered its Memorandum Decision holding (1) that there is no Puyallup Tribe which succeeds in interest to the rights of the Puyallup signers of the Treaty of Medicine Creek, (2) that the Puyallup Reservation, established in accordance with that treaty, has ceased to exist, and (3) that, despite its finding that Indian fishing (in 1964) accounted for only 3-5% of the total catch, the regulations sought to be enforced by the State were reasonably necessary for the preservation of salmon and steelhead fish. Subsequently, the court entered a decree enjoining all members of the Puyallup Tribe from fishing in the Puyallup River watershed and Commencement Bay except in compliance with the rules and regulations of the Department of Fisheries.

Upon appeal by the tribe, the Washington Supreme Court reversed the lower court's finding that the Puyallup Tribe no longer was in being, but held (1) that the Puyallup Reservation had ceased to exist, and (2) that members of the Puyallup Tribe exercising treaty-reserved fishing rights are subject to restrictions by the State not shown to be indispensable to preservation of the fishery. Although the petitioner and *amicus curiae* again challenged the Superior Court's jurisdiction, the court below failed to rule upon the key question of whether the Puyallup Tribe enjoys sovereign immunity from suit. Because the original injunction entered by the lower court, reflecting its determination that the Puyallup Indians had no treaty fishing rights, prohibited members of petitioner from fishing contrary

to all regulations of the Department, the Supreme Court remanded the case "for the entry of a judgment and decree predicated upon the proposition that the defendants do have treaty rights, but that they are subject to conservation regulations which are reasonable and necessary to preserve the fishery." Pet. A-52.

On June 2, 1967, the Superior Court entered its amended injunction permanently enjoining all members of petitioner tribe "from driftnet or setnet fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington." Pet. A-68.

QUESTIONS PRESENTED

I. WHETHER INDIANS EXERCISING THE RIGHTS GUARANTEED PURSUANT TO TREATY WITH THE UNITED STATES TO FISH WITHIN THE RESERVATION BOUNDARIES AND AT USUAL AND ACCUSTOMED SITES LOCATED OUTSIDE OF THE RESERVATION ARE SUBJECT TO STATE REGULATIONS NOT SHOWN TO BE INDISPENSABLE TO THE PRESERVATION OF THE FISHERY.

II. WHETHER A RECOGNIZED TRIBE OF AMERICAN INDIANS MAY BE SUED WITHOUT ITS CONSENT OR THAT OF THE UNITED STATES.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE SUPREME COURT OF THE STATE OF WASHINGTON CONTRAVENES THE TREATY OF MEDICINE CREEK.

The right of members of the Puyallup Tribe to take fish within the boundaries of its reservation and at usual and accustomed places located outside of that area derives from a solemn contractual commitment made by the United States to the forebears of peti-

tioner tribe. This commitment furnished a major part of the consideration for the cession to the United States of a substantial and valuable portion of the State of Washington previously used and occupied by Puyallup Indians, and thus constitutes a compensable property interest, the taking of which may not be accomplished without action of Congress and payment of just compensation. *Whitefoot* v. *United States,* 293 F. 2d 658 (Ct. Cl. 1961), *cert. denied,* 369 U.S. 818 (1962); see *United States* v. *Winans,* 198 U.S. 371, 381 (1905); *Menominee Tribe of Indians* v. *United States,* No. 339-65 (Ct. Cl. April 14, 1967); *The Tlingit and Haida Indians of Alaska* v. *United States,* 177 F. Supp. 452 (Ct. Cl. 1959); Hobbs, *Indian Hunting and Fishing Rights,* 32 Geo. Wash. L. Rev. 504, 518 (1964). The decision of the lower court, sanctioning imposition of State fishing regulations not shown to be indispensable to the preservation of the fishery with respect to members of petitioner tribe exercising such rights, constitutes an unlawful taking of the property of the Puyallup Tribe and contravenes the Treaty of Medicine Creek. Such disregard for the applicable law cannot be allowed to stand.

A. Members of the Puyallup Tribe Fishing Within the Exterior Boundaries of the Puyallup Reservation Are Not Subject to State Regulation

The right of Indians freely to fish within the boundaries of reservations established for their benefit, without interference by State authorities, uniformly has been upheld by the courts. *United States* v. *Winans,* 198 U.S. 371 (1905); *Moore* v. *United States,* 157 F. 2d 760 (9th Cir. 1946), *cert. denied,* 330 U.S. 827 (1947); *Mason* v. *Sams,* 5 F. 2d 255 (W.D. Wash. 1925); *In re Blackbird,* 109 Fed. 139 (W.D. Wis. 1901); see *Or-*

ganized Village of Kake v. *Egan,* 369 U.S. 60, 75 (1962). Since Indian treaties contemplate retention by the tribes of all rights previously existing in lands thereby reserved to them, the right to fish within the boundaries of the reservation exclusive of State restrictions does not depend upon the existence of express treaty language so providing. *United States* v. *Winans, supra; Moore* v. *United States, supra; Mason* v. *Sams, supra;* See *Winters* v. *United States,* 207 U.S. 564 (1908).

While not challenging this principle, the court below ruled that the members of the Puyallup Tribe no longer have "any special or treaty rights to fish" within reservation boundaries because "there is no longer a reservation." Pet. A-51. Such a holding is contrary to the overwhelming weight of authority requiring Congressional sanction for dissolution of an Indian reservation (which approval may not be found in the allotment of the land or the conveyance of fee patents, the factors cited by the Washington Supreme Court), and, accordingly, is erroneous as a matter of law.

This Court has made it abundantly clear that only Congress has the power to abolish an Indian reservation. *Seymour* v. *Superintendent,* 368 U.S. 351, 359 (1962); *Creek County* v. *Seber,* 318 U.S. 705 (1943); *United States* v. *Celestine,* 215 U.S. 278, 285 (1909), ". . . . when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.")

Contrary to the lower court's finding, the conveyance of patents in fee to reservation land does not reflect a Congressional purpose to discontinue the special status accorded Indian reservations, as is conclusively evi-

denced by the Act of June 25, 1948, 62 Stat. 757, 18 U.S.C. 1151, as amended. Under this statute, Congress defined "Indian Country" for purposes of assertion of Federal jurisdiction to include:

> all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent,* and, including rights-of-way running through the reservation. . . (Emphasis added.)

The application of Federal law to Indians on lands within a reservation patented and sold to a non-Indian, and the prohibition against exercise of State jurisdiction in such situations pursuant to the 1948 Act, repeatedly has been sustained. *Seymour* v. *Superintendent, supra; Guith* v. *United States,* 230 F. 2d 481 (9th Cir. 1956); *State* v. *District Court,* 125 Mont. 398, 239 P. 2d 272 (1951).

Moreover, the cases are legion to the effect that allotment does not oust exclusive Federal jurisdiction over Indian reservations with respect to matters involving Indians or otherwise so erase reservation boundaries as to sanction the application therein of State laws. *Seymour* v. *Superintendent, supra; United States* v. *Nice,* 241 U.S. 591 (1916); *United States* v. *Pelican,* 232 U.S. 442 (1914); *United States* v. *Celestine, supra.* Indeed, with specific reference to the Puyallup Reservation, this Court in *United States* v. *Celestine, supra,* quoted with approval from the opinion of Judge (subsequently Mr. Justice) McKenna in *Eells* v. *Ross,* 64 Fed. 417 (9th Cir. 1894) as follows (215 U.S. at 287):

> 'It is not disputed that the lands are a part of those set apart as the Puyallup Reservation, and

> that the reservation has not been directly revoked; but it is contended that the allotment of the lands in severalty, and afterwards making the Indians citizens, necessarily had the effect to revoke the reservation. There is plausibility in the argument, and it needs to be carefully considered. It is clear that the allotment alone could not have this effect (The Kansas Indians [Blue Jacket v. Johnson County] 5 Wall. 737, 18 L ed. 667), and citizenship can only have it if citizenship is inconsistent with the existence of a reservation. It is not necessarily so. *Some of the restraints of a reservation may be inconsistent with the rights of citizens.. The advantages of a reservation are not; and if, to secure the latter to the Indians, others not Indians are excluded, it is not clear what right they have to complain.'* (Emphasis added.)

Eells v. *Ross, supra,* affirmed the continued existence of the Puyallup Reservation following enactment of the Puyallup Allotment Act.

In marked contrast to the general legislation relied upon by the court below, when Congress actually has decided to end the status of an Indian reservation and thereby to eliminate special rights secured to tribal members by Federal treaty, its intention to do so has been clear and precise. See e.g., Klamath Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. 564; Menominee Termination Act of June 17, 1954, 68 Stat. 250, 25 U.S.C. 891. Relying upon the manifest purpose of the termination acts—dissolution of tribal property, accession of State jurisdiction and severance of all Federal services—the courts have discerned in such legislation a clear Congressional sanction for the nullification of the treaty-protected rights previously enjoyed by the Klamath and Menominee tribes.

Klamath and Modoc Tribes v. *Maison,* 338 F. 2d 620 (9th Cir. 1964); *State* v. *Sanapaw,* 21 Wisc. 2d 377, 124 N.W. 2d 41 (1963), *cert. denied,* 377 U.S. 999 (1964). No such legislation has been enacted with respect to the Puyallup Tribe, and no such Congressional imprimatur has been put upon the treaty violation practiced in this case by the State of Washington.

In short, Congress, which has the power, has not abolished the Puyallup Reservation, and the Supreme Court of the State of Washington has not the authority to do so. With respect to fishing on the reservation by Puyallup Indians, the decision of the lower court is in irreconcilable conflict with the Treaty of Medicine Creek and must be reversed.

B. Members of the Puyallup Tribe Fishing "At All Usual and Accustomed Grounds and Stations" Outside the Puyallup Reservation Are Subject Only to Regulations Demonstrated by the State to be Indispensable to the Conservation of the Fish

Under Article III of the Treaty of Medicine Creek, the United States pledged for the benefit, *inter alia,* of petitioner's members that:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory . . .

There is no dispute that the fishing at issue in the instant case, other than that conducted within the reservation, occurred at such "usual and accustomed" sites. The lower court concluded, however, that Puyallup Indians may be restricted by the State in the exercise of their off-reservation fishing rights by application of so-called "reasonable and necessary" regula-

tions. This decision is premised upon a fundamental misconception both of the rights secured to petitioner by the Treaty of Medicine Creek and of the burden which the State must bear in order to justify imposition of restrictions upon members of the Puyallup Tribe.

As the historical context makes plain, the purpose of Article III was (1) to preserve to the signatory tribes rights, already existing, to fish freely at "usual and accustomed" places located outside the reservations to be established in accordance with the treaty, and (2) to grant to "citizens" the privilege, not formerly enjoyed, to fish at such places "in common" with the members of the tribes. Of the identical clause in the Yakima Treaty of June 9, 1855, 12 Stat. 951, this Court explained in *United States* v. *Winans,* 198 U.S. 371, 381 (1905):

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them,—a reservation of those not granted.

The new condition referred to above, of course, was the arrival of the settlers. In anticipation of this event, the treaty required the Indians to allow the "citizens" to share the former's usual and accustomed fishing places. But the treaty no less clearly recog-

nized and promised to secure the right of the Indians—limited only by the requirement as to common use—to continue to take fish at such locations.

Recognition of their continuing rights requires that restriction upon Indian fishing at usual and accustomed off-reservation sites be limited to those regulations which are indispensable to the accomplishment of conservation objectives which cannot otherwise be attained. *Maison* v. *Confederated Tribes of the Umatilla Reservation,* 314 Fed. 169 (9th Cir. 1963), *cert. denied,* 375 U.S. 829 (1964). As the court pointed out in the *Umatilla* case, conservation necessarily involves the allocation of a limited resource among those demanding to share in it—in this case commercial and sports fishermen, who in 1964 accounted for some 95%-97% of the total salmon catch, as well as Indians. Since non-Indians have only a mere privilege to take fish, *Geer* v. *Connecticut,* 161 U.S. 519, 532 (1896), as contrasted with the treaty right vested in members of the Puyallup Tribe, "restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by a restriction of the fishing of others." *Maison* v. *Confederated Tribes of the Umatilla Reservation, supra,* at 173.

Unlike the Ninth Circuit, the court below made no inquiry into the critical question—i.e., whether the State could accomplish its conservation objectives through more rigorous regulation of non-Indian fishing, or by other means not having so severe an impact upon members of the petitioner tribe. Similarly, the court below did not consider whether preservation of the Puyallup River fishery, even assuming the need for regulation, requires so severe a curtailment of Indian

fishing as the State has imposed. (One issue not resolved by the Washington Supreme Court, for example, is whether the goal of conservation could not be attained through imposition of regulations designed to effect the minimum escapement level necessary for propagation. See *Makah Indian Tribe* v. *Schoettler,* 192 F. 2d 224, 225 (9th Cir. 1951). In short, by adopting a "reasonable and necessary" standard, the lower court ruling affords members of the Puyallup Tribe no greater rights than those guaranteed to all persons in the State of Washington under the Fourteenth Amendment. *Torao Takahaski* v. *Fish and Game Commission,* 334 U.S. 410 (1948); *Begay* v. *Sawtelle,* 53 Ariz. 304, 88 P. 2d 999 (1939).

This decision is patently contrary to the manifest intent of the treaty, to wit: to provide a small and distinct racial minority with legally enforceable rights, as opposed to privileges protected only by the requirements of equal treatment and the political process. As the facts of this case make painfully clear, the State of Washington, rather than restrict those more populous and powerful groups which account for the vast majority of salmon caught each year or those who pollute the waters in which the fish breed, has sought to prohibit through regulation fishing by a handful of Indians. If the Treaty of Medicine Creek is to have continued meaning, such an effort cannot be allowed to succeed.

II. THE RULING OF THE SUPREME COURT OF THE STATE OF WASHINGTON WITH RESPECT TO THE AUTHORITY OF THE STATES TO RESTRICT TREATY PROTECTED INDIAN FISHING IS IN DIRECT CONFLICT WITH DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS AND OF OTHER STATE COURTS.

The holding of the court below that members of the Puyallup Tribe exercising their rights pursuant to the Treaty of Medicine Creek to fish "at all Usual and Accustomed Grounds and Stations" are subject to reasonable and necessary State regulations is in direct and irreconcilable conflict with the decisions of the Court of Appeals for the Ninth Circuit and the Supreme Court of the State of Idaho.

As has been discussed, the Ninth Circuit in *Maison* v. *Confederated Tribes of Umatilla Indian Reservation, supra,* considering identical treaty language, held that only such State conservation measures as are indispensable to the preservation of the fish resources may be enforced against Indians fishing under sanction of a treaty with the United States. Accord, *Makah Indian Tribe* v. *Schoettler, supra; Confederated Tribes of the Umatilla Reservation* v. *Maison,* 262 F. Supp. 871 (D. Ore. 1966). On the other hand, the Idaho Supreme Court, in a case involving Indian hunting, decided that the State of Idaho could not impose any restrictions upon exercise of rights reserved by treaty with the United States. *State* v. *Arthur,* 74 Idaho 251, 261 P. 2d 135 (1953), *cert. denied,* 347 U.S. 937 (1954). The Court of Claims reached the same result in regard to the authority of the State of Wisconsin in *Menominee Tribe of Indians* v. *United States,* No. 339-65 (Ct. Cl. April 14, 1967).

In the instant case, the Washington Supreme Court explicitly rejected the *Umatilla* standard, character-

izing that test as "completely unworkable" (Pet. A-49), and did not even consider the more stringent *Arthur* rule. Instead, the court below adopted a "reasonable and necessary" test which does not require inquiry into the feasibility of accomplishing conservation objectives through means other than restriction of Indian fishing.

These contradictory decisions have produced an intolerable measure of uncertainty with respect to the exercise of basic rights secured by treaties with the United States. More particularly, members of the Puyallup Tribe are now subject to criminal prosecution (contempt of the injunction and/or violation of the fishing regulations) for acts which, in accordance with the law in the Ninth Circuit, may well enjoy immunity from State control. In addition, a member of an Idaho tribe having treaty fishing rights may not be prosecuted by that State even though his action, if performed in Washington by himself or by a member of a Washington tribe under aegis of identical treaty language, would be subject to criminal penalty.

It is respectfully submitted that the irreconcilable conflict between the decision of the Washington Supreme Court in this case and earlier holdings of the United States Court of Appeals having jurisdiction in the State of Washington makes essential the establishment by this Court of a consistent, uniform standard delineating the proper limits of State authority to restrict Indian treaty fishing. For the reasons discussed above, the Association, as *amicus curiae*, further urges that this Court adopt the Ninth Circuit rule as the governing standard for regulation of off-reservation Indian fishing at usual and accustomed sites pursuant to treaty with the United States.

III. THE DECISION OF THE WASHINGTON STATE SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT AND THE LOWER FEDERAL COURTS HOLDING THAT AN INDIAN TRIBE IS NOT SUBJECT TO SUIT WITHOUT CONSENT BY THE TRIBE OR THE UNITED STATES.

The immunity of Indian tribes from suit, absent consent of the tribe or the United States, is too firmly established in the law now to be questioned. *United States* v. *United Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Maryland Casualty Co.* v. *Citizens Nat'l Bank of West Hollywood*, 361 F. 2d 517 (5th Cir. 1966); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F. 2d 529 (8th Cir. 1967). As this Court made plain in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. at 512-3:

> The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations [the Choctaws] are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal property did. (Footnotes omitted)

As a matter of fact and law, the United States has not authorized suits against the Puyallup Tribe, and the record herein contains no indication to the contrary. The petitioner tribe not only has never consented to be sued, but has vigorously opposed assertion of jurisdiction in this case on grounds of sovereign immunity.

The conclusion, therefore, is inescapable that the Puyallup Tribe (which has never been dissolved) may not be sued in the courts of the State of Washington

without its consent or that of the United States. Nonetheless, the Washington Supreme Court, without even discussing the point, upheld the lower court's jurisdiction over the petitioner tribe.[7] Unless that unprecedented decision is reversed by this Court, it may serve as the predicate for further erosion by State courts of tribal immunity, thereby exposing the limited resources of Indian governments to indiscriminate suits.

CONCLUSION

For the reasons set forth in this brief, the Association on American Indian Affairs, Inc., as *amicus curiae,* urges this Court to issue a writ of certiorari to the Supreme Court of the State of Washington and to reverse the decision of that court.

Respectfully submitted,

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[7] The Superior Court had ruled that the Puyallup Tribe no longer exists. (See Pet. A 14-34). The Washington Supreme Court overruled the lower court on this point, but did not go on to consider the issue of immunity from suit which necessarily follows from the court's determination of continued tribal existence and which petitioner tribe vigorously asserted.

EXHIBIT A

PORTLAND, OREG.
OREGONIAN

D. 216,367 — S. 356,753

May 5, 1966

INDIANS FIGHT OFF RAID BY STATE GAME OFFICERS

STEVENSON, Wash. (Special)—Rebel Indians were claiming Wednesday they had repulsed an amphibious "sneak attack" by Washington state game protectors on Indian fishing grounds at Cooks Landing.

An Indian spokesman said several shots were fired near midnight Tuesday at boats attempting to haul Indian fishing nets out of the river.

J.E. Lasater, assistant director of the Washington Department of Fisheries, verified some of the information reported by the Indians.

According to Leo Alexander, secretary for the Columbia River Fish Commission of the Yakima Indian Nation, several patrol officers in two boats Tuesday night nosed into the Cooks Landing area, where the rebel Indian group has set up "camp."

Alexander claimed the boats were attempting to steal nets. He said Indian sentries shouted warnings at the men in the boats but that one boat continued nosing in to the area where Indian boats are anchored.

SENTRIES FIRE SHOTS

The sentries then fired shots from high-powered rifles into the water near the boat and the boats took off, Alexander reported.

Lasater said that, according to the report turned in by the game protectors, one state boat was making its way upstream on routine patrol and that the boat passed the outer-end float of a net "in the dark."

According to the report, there were no warning shouts from the Indians but game protectors did hear one shot and saw a splash near the end of their boat.

The rebel group, using armed guards, has continued daily fishing above Bonneville Dam—an illegal activity in the eyes of Washington state fish officials. The Indians claim they are acting under rights granted to them by treaty.

PORTLAND, OREG.
OREGONIAN

D. 216,367 — S. 356,753

April 28, 1966

INDIANS FISH UNDER GUARD

COOK, Wash. (Special)—All was calm on the Columbia Wednesday as Alvin Settler's Indians continued to fish under armed guard.

Washington Fisheries and Game Department agents made no effort to interfere with the two set nets anchored to the three-acre site of Indian land, which Settler claims has the sanctity of an Indian reservation.

Spokesmen in Olympia said no warrants had been sought and none would be as long as the armed movement did not spread.

Settler, "attorney general of the group", Wednesday invited press, radio, television and some Washington and Oregon political candidates to a salmon bake at the Cook site at 12 o'clock noon Friday.

The Indians will stage ceremonial dances in honor of their five-man "Columbia River Fish Commission" as they pull their nets out of the river in compliance with their own conservation regulations and leave them out until Sunday noon, Settler said.

The commission is not recognized by the Yakima Tribal Council, which has a slightly different set of conservation regulations. State officials don't recognize either group's regulations.

EXHIBIT B

ASTORIA, OREG.
DAILY ASTORIAN

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ARMED INDIANS INTOLERABLE

The upriver Indians had better put away their rifles before someone gets hurt and they find themselves in more serious trouble than they are in now.

This show of armed defiance of Oregon and Washington fishery authorities is stupid. It is nothing more than a gesture, but it is going to make some white people angry and could lead to bloodshed.

If the Indians can't win in court, they can't win by armed force, and they ought to know it by now.

A sure way to have their treaty rights extinguished is by an attempt to use arms to enforce them. The government is not going to tolerate an armed, independent Indian nation which can threaten to shoot people it considers to be interfering with its rights. If the Indians consider themselves independent to an extent that they have a right to bear arms, obviously they will have to be suppressed.

The officials of the federal Indian Affairs Bureau, by encouraging the Indians to defy Oregon and Washington fishery authorities rather than cooperating with these agencies, have done them a disservice.

Presumably these officials did not go so far as to advise the Indians to take up arms, but they certainly encouraged the Indians to adopt an attitude that they were superior to state law. These federal advisers to the Indians had better persuade them to put down their guns fast.